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Supreme Court, U.S.
FILED

94 1859 MAY 11 1995

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

David Lee Powell, *Petitioner*

v.

State of Texas, *Respondent*

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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May 1994

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QUESTIONS PRESENTED

1. Whether the State's use of psychiatric testimony ruled by this Court to have been unconstitutionally obtained violates this Court's mandateand the Fifth and Sixth Amendments, and denies due process of law.

2. Whether packing the trial court with police officers and other persons wearing badges and pro-prosecution signs, and then referring to this display during summations in an effort to influence the jury and the trial judge, violates due process and the Eighth Amendment, and whether such misconduct requires a new trial.

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In the Supreme Court of the United States
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David Lee Powell, *Petitioner*

v.

State of Texas, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

David Lee Powell respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINION BELOW

The opinion of the Court of Criminal Appeals is not yet officially reported. It may be found at 1994 WL 679954 (Tex.Cr.App. 1994), and in the Appendix.

JURISDICTION

The Court of Criminal Appeals opinion and judgment were rendered December 7, 1994. The State's timely Motion for Rehearing was denied February 15, 1995. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. 5:
No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

U.S. Const., amend. 6:
In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence.

U.S. Const, amend. 14:
[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

This case has been to this Court twice before. In *Powell v. Texas*, 487 U.S. 1230 (1988)[*Powell I*], the Court vacated the conviction[1] and remanded to the Texas Court of Criminal Appeals in light of *Satterwhite v. Texas*, 486 U.S. 249 (1988), because the State had caused Mr. Powell to be examined by a psychiatrist -- Dr. Richard Coons, M.D. -- on the day of his arrest, without the notice required by *Satterwhite*. The Court of Criminal Appeals, despite this error, adhered to its opinion affirming the conviction and sentence of death. 767 S.W.2d 759 (Tex.Cr.App. 1989). This Court, per curiam, "reverse[d] the judgment of the Court of Criminal Appeals." 492 U.S. 680 (1989)[*Powell II*] That Court, in obedience to this mandate, reversed and remanded for a new trial. 784 S.W.2d 934 (Tx.Crim.App. 1990)(Table).

At the new trial, the State again used the services and testimony of Dr. Coons, and again obtained a judgment of conviction and death. The Court of Criminal Appeals entered a judgment reversing and remanding, but left open under Texas law the possibility that petitioner will not receive a retrial on guilt but only on punishment. The Court of Criminal Appeals specifically noted its concern with the "lynch-mob atmosphere" at the punishment trial, and the "State's and trial court's disregard for legal precedent set by the Supreme Court" in using Dr. Coons' testimony,[2] but did

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[1] Vacating Powell v. State, 742 S.W.2d 353 (Tex. Cr. App. 1987).

[2] As the Court said, "Some of the unaddressed points of error are troubling in that they reflect a pattern by the State and trial court of disregard for certain basic constitutional principles. Points one and two, for example, complain of the lynch-mob atmosphere created by the single file entry into the court room of about eighty-five uniformed and armed police officers with mourning ribbon taped over their badges. It is

not expressly base its judgment upon these findings. The Court denied the State's timely motion for rehearing, in which the State disputed the factual and legal basis for these observations.

Powell is here because the judgment below did not grant him the full relief to which he was entitled -- an unequivocal order for a new trial. Resolution of this issue at this procedural hour would help to ensure the orderly and fair disposition of this case.

Facts

We summarize the facts briefly. A fuller account appears in the various opinions, e.g., 742 S.W.2d 353 (Tex.Crim.App. 1987).

The trial record revealed Powell's upbringing on a family farm in Texas, and the abrupt changes in his life that began during his student days at the University of Texas, Austin. Powell entered UT in 1968 as a scholarship student. The political and social turmoil on the campus contributed to changes in his political views, and thereafter to a pattern of drug use and clinical depression. From 1968 to 1977, successful attendance at school alternated with episodes of mental illness, drug use and petty crime. In 1977, one of his treating doctors prescribed a medication that caused Powell

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particularly unsettling that the demonstration was apparently orchestrated by the prosecuting attorney to give effect to his closing argument. Appellant complains that the defense's closing argument was made over the head of a police officer sitting on the floor within the bar because of the crowded condition of the court room. Similarly disturbing was the State's and trial court's disregard for legal precedent set by the Supreme Court of the United States in reversing appellant's prior capital murder conviction,--said precedent affecting the testimony of Dr. Coons as to punishment issues. We note that the disregard for the legislative mandates of Art. 37.071 poignantly reflects the pattern of escalating disregard for constitutional order on the part of the trial court and the State in appellant's case. Nowhere is the rule-of-law more important than in our courts, and our prosecuting and policing agencies." Slip op. at 11 n.7, Appendix, p. 19a.

to hallucinate and to have paranoid fantasies. During the 1970s, Powell had a relationship with Sheila Meinert, who was also a drug user.

Shortly after midnight on May 18, 1978, Powell was riding in a red Ford Mustang with Sheila Meinert and, apparently, another person whose identity has never been established. Meinert testified at trial that Mr. Powell had asked her to drive him to South Austin, and that he had with him a rifle, a pistol, a hand-grenade, radical literature, and drugs. Meinert testified that although Powell had been carrying drugs for months, she did not believe he was capable of shooting anyone.

Austin police officer Ralph Ablanedo stopped the car, apparently for a traffic violation. Meinert was driving. Meinert got out of the car. Officer Ablanedo talked with Meinert and radioed in for a check on her and on the car. Because Meinert did not have her driver's license, Officer Ablanedo asked for Mr. Powell's license as well. He then gave Meinert a citation and allowed her to drive away.

Shortly, the police dispatcher told Ablanedo that there was a "possible wanted" on Mr. Powell, so he chased the Mustang and signaled it to stop. Meinert got out of the car and walked towards Ablanedo. There was gunfire. Ablanedo fell, mortally wounded.

As he lay on the ground, Ablanedo said to the other officers who had arrived, "don't move me . . . that damn girl." Eduardo Segura, resident of a nearby apartment, came to help Ablanedo and asked him, "who did it?" Ablanedo replied it was "a girl." Another police officer claimed at petitioner's retrial that Ablanedo had also said, "*he* got me with a shotgun."

One witness said that petitioner was in the rear seat of the Mustang as the shots were fired, with another person in the driver's seat. After Ablanedo fell, Meinert got back in the Mustang, which was driven off. The other officers began a search of the neighborhood.

Within a short time, Austin police officer Villegas saw the Mustang in an apartment parking lot. He could only see two people in the car. Someone in the car fired at Villegas, who returned the fire. Other officers said that someone with long hair made a throwing motion towards the police, and that an unexploded hand grenade was found nearby. Meinert and petitioner both had long hair, and the officers could not make a positive identification. One officer said he thought Powell threw the grenade.

Meinert was arrested near the Mustang, and a cache of weapons was found. Several hours later, at dawn, a school patrolman found Mr. Powell under a bush at a nearby high school. Mr. Powell was arrested and offered no resistance. The third occupant of the Mustang has never been apprehended.

Psychiatric Testimony

At his first trial, Mr. Powell presented the defense that he had been insane on May 18, 1978, due largely to his use of psychoactive drugs such as amphetamines. The State countered this evidence with the testimony of Dr. Richard Coons, M.D., and a psychologist, Dr. George Parker. Dr. Coons had repeatedly examined Mr. Powell, on the State's motion, first made the morning of May 18, 1978. Drs. Coons and Parker also testified in the penalty phase of the first trial, on the issue of "future dangerousness." The constitutional violation there committed was the subject of *Powell v. Texas*, 492 U.S. 680 (1989).

On retrial, Mr. Powell was convicted of capital murder. The prosecution and defense sharply differed over the forensic evidence, and over the credibility of Ms. Meinert, who had received immunity and who was in a position to have been the "shooter." In its case-in-chief, the State introduced over objection items petitioner was carrying when he was arrested, including a piece of campaign literature for Court of Criminal Appeals Judge Sam Houston Clinton and an article about a punk rock singer who had

robbed a bank and escaped from prison. Given the publicity about petitioner's case, it was likely that some jurors would recall that Judge Clinton had twice voted to reverse petitioner's first conviction.

In the penalty phase of the trial, psychiatric testimony again played a large role -- at the State's initiation. The State presented, in his direct case, the testimony of Dr. Clay Griffith that Mr. Powell was dangerous and that drug use did not cause him to shoot a police officer.

The defense countered with testimony from Dr. Lester Grinspoon, author of a respected book entitled "The Speed Culture," on the effect of amphetamines. Dr. Richard Pesikoff testified -- based on 400 to 600 hours of research and interviews -- about Mr. Powell's addiction, and his rehabilitation in prison.

The State first raised the specter of Dr. Coons' unconstitutional 1978 examination of Mr. Powell by asking Dr. Pesikoff, over objection, if he knew of Coons' conclusions. Then, again over defense objection that specifically invoked this Court's opinion, the State introduced Dr. Coons' report from the prior trial as extrinsic evidence. This report had formed part of the very evidence that led to reversals in *Powell I* and *Powell II*.

More testimony followed, first from the well-known Dr. James Grigson, and then from experts who showed that Grigson's conclusions and methodology are flawed.

The State continued the battle of experts on rebuttal, and offered testimony from Dr. Wesley Wallace, yet another doctor who examined Mr. Powell just 12 hours after his arrest in 1978, in the presence of police officers, and without any warnings as to Powell's rights.

Continuing in its tactics, the State offered Dr. Coons in person, who testifed over objection to the interviews he had conducted with Mr. Powell in 1978. Prosecutors in summation repeatedly vouched for Dr. Coons' opinions, saying that Dr. Pesikoff had been paid, but that Dr. Coons

had conducted a *court-ordered* examination soon after the event, so -- as the prosecutor assured the jury "he's telling you the truth." This court-ordered examination was, of course, none other than the unconstitutional episode this Court denounced in *Powell II*.

Police Officers' Courtroom Demonstration

At closing argument in the punishment phase of trial, Austin police officers in uniform suddenly began to stream in to the small semicircular courtroom. They marched in single file as summations began. They passed around the metal detector. A woman from an office being used by the District Attorney placed a strip of purple tape over the badge of each officer as a sign of mourning. The parade continued until every seat the courtroom was filled, and then officers began to sit on the floor between defense counsel and the jury box. Civilian spectators in seats near the jury sported buttons and facsimile police badges saying "police pal" and "police buddy." Other police officers stood at the back of the courtroom, three deep.

The prosecutor made the most of this display in summation, with references to the need to "protect the badge." "I saw a poster once," the prosecutor intoned, "that had a picture of a badge with a piece of tape over it, and the caption reads, 'Officers give more than tickets.'"

The jury answered the special issues in the affirmative, and Mr. Powell was sentenced to death.

Surprised by the sudden influx of officers, with the jury in the box and summations about to begin, defense counsel nonetheless was able -- at the hearing on motion for new trial -- to make a record on the issue that led the Court of Criminal Appeals to conclude that a "lynch-mob atmosphere" prevailed.

REASONS FOR GRANTING THE PETITION

1. This Court's Mandate Was Not Followed

This petition is brought because the fundamental errors presented -- and in major part acknowledged by the Court of Criminal Appeals -- require the unequivocal grant of a new trial. The Court of Criminal Appeals sidestepped this issue, leaving open the prospect that petitioner would receive only a new hearing on sentence. It did so by invoking a statute that was not even in existence at the time of the offense -- Tex. C.Crim.Proc. art. 44.29(c), as amended in 1993 to provide that if any court

> sets aside or invalidates the sentence of a defendant convicted of an offense under Section 19.03 of the Penal Code on the basis of any error affecting punishment only, the court shall not set aside the conviction but rather shall commence a new punishment hearing as if a finding of guilt had been returned.[3]

The Court of Criminal Appeals has held under a closely related statute that the trial court will decide in the first instance whether an entire new trial shall be granted. *Ex parte Sewell*, 742 S.W.2d 393, 397 (1987), construing Tex. C. Crim.P. 44.29(b).

The Court of Criminal Appeals' action in leaving open the prospect that petitioner would not receive a new trial on guilt was wrong because under Texas law the jury's finding of guilt does not result in a judgment being entered -- the "trial" continues to another "stage". Under the statute applicable to petitioner's case, the jury is to decide at the second stage whether the "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the

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[3] The statute as it stood when the alleged offense occurred required a new trial in case of reversible error at any phase of a bifurcated jury trial. See Ellason v State, 432 S.W.2d 955, 957 (Tex.Cr.App. 1968).

deceased or another would result." Tx. C.Crim.P. art. 37.071 (former provision). The jury's first-stage verdict establishes only that the defendant is guilty of "knowing" or "intentional" murder, Tx. P.C. art. 19.02(b)(1), and that the victim was a peace officer. Tx. P.C. art. 19.03(a)(1).

The Court need not, however, address this potential infirmity of art. 44.29(c).[4] The errors on which certiorari is sought infected this case root and branch. The jury's initial finding of guilt was not, and could not be, the subject of any judgment when the State began to violate this Court's mandate and use forbidden psychiatric testimony. The "lynch-mob atmosphere" created by the State was designed to affect and intimidate not only the jurors but the trial judge. The trial judge had not entered judgment on the jury's finding of guilt. A new trial motion going to the whole case could not be made until after the jury had answered the special issues on punishment, and the trial judge thus retained the power to make rulings affecting guilt as well as punishment. The trial judge was an elected official facing a contested race, and the packed courtroom was as much an effort to impress and affect his judgment as much as the jury's.

Thus, there is no principled way to slice up the errors shown by the record and found by the Court of Criminal Appeals, and deny their effect upon the entire judgment of guilt and sentence. This Court has jurisdiction because petitioner sought outright and unequivocal reversal and did not obtain that relief.

2. The State Repeated the Constitutional Violation Condemned in *Powell II*

This Court has made clear the State's obligation when a psychiatrist is sent to examine a capital defendant. The defendant has the right to counsel's "guiding hand" at

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[4] Indeed, given Texas law on when the issue would be raised, the question would not be open at this procedural hour. Ex parte Sewell, *supra*.

that critical stage. *Estelle v. Smith*, 451 U.S. 454 (1981); *Satterwhite v. Texas*, 486 U.S. 249 (1988). Dr. Coons conducted an examination of petitioner without giving notice that he would be concerned with future dangerousness and with the penalty phase of petitioner's trial.

This Court sharply rebuked the Texas authorities in reversing petitioner's conviction in *Powell II*, 492 U.S. 680 (1989). Those authorities -- prosecutorial and judicial -- were without lawful power to annul a judgment of this Court or to trifle with rights acquired under it. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

The State contended below that petitioner "opened the door" to Dr. Coons' testimony by putting on mental condition testimony in the penalty phase. This contention was rejected by this Court in *Powell II*. Moreover, the State began the mental condition debate at the penalty phase. The defense testimony that allegedly "opened the door" was in reality an effort to close a door that the prosecution had opened. Petitioner had a statutory, Tex. C.Crim.Proc. 37.071, and constitutional right to rebut the State's evidence, and should not be made to purchase that opportunity at the cost of his Sixth Amendment rights.

The State's Sixth Amendment violation was at this trial compounded by a Fifth Amendment error. At previous trials, Dr. Coons did not testify to giving petitioner any warnings before examining him in the jail. At this trial, however, without benefit of any contemporaneous notes, and in answer to leading questions, Dr. Coons said that he gave petitioner a "*Miranda*" warning. Dr. Coons did not testify to the content of this alleged warning, nor to any response that petitioner made to them. The warning did not meet the *Tague v. Louisiana*, 444 U.S. 469 (1980), standard.

3. A "Lynch-Mob Atmosphere" Prevailed at a Critical Juncture of the Trial[5]

The courtroom demonstration began and was conducted so as to maximize its impact, and to have its main focus behind defense counsel, whose attention was at that moment riveted on the jury box where his client's fate would be decided.[6] The trial judge, who was in the best position to see exactly what was happening, neither said nor did anything about the situation, and when confronted with the issue by a timely new trial motion denied relief.

No extensive discussion of this event should be necessary, nor need petitioner anticipate the State's arguments on this score. The Court of Criminal Appeals characterized the situation and adhered to its findings in the face of a petition for rehearing.

Mob rule and appeals for passion and vengeance have no place in trials -- civil or criminal. *Turner v. Louisiana*, 379 U.S. 466 (1965); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Moore v. Dempsey*, 261 U.S. 86 (1923). A civil trial so infected by prejudice would not be tolerated. See *Honda Motor Co. v.*

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[5] The State's studied and cynical disregard of elementary fairness is amply demonstrated on this record. For example, when petitioner was arrested, he had an item of Judge Sam Houston Clinton's campaign literature in his pocket, and a newspaper clipping about a punk rock singer who had robbed a bank and escaped from prison. These items had no probative value. They were admitted in evidence over objection. The campaign literature had an eerie significance in the context of this case. The case took place in the state capital, Austin, where the Court of Criminal Appeals sits and Judge Clinton lives. Judge Clinton, when in private practice, courageously defended unpopular defendants. Texas elects its judges, and Judge Clinton's votes to reverse appellant's earlier conviction -- a vote upheld by this Court -- were matters of public notoriety.

[6] The demonstration was precisely the kind of misconduct that puts defense counsel in an impossible position. Not only was it largely done behind counsel's back, the only possible objection at that moment would -- if sustained -- have resulted in the officers filing out the courtroom with their badges of mourning, in full view of the jury.

Oberg, 114 S.Ct. 2331 (1994). Courtroom security could not conceivably justify this show of force. Compare *Holbrook v. Flynn*, 475 U.S. 560 (1986). See also *United States v. Yahweh*, 779 F. Supp. 1342 (S.D. Fla. 1992)(barring spectator garb designed to show support for defendants).

CONCLUSION

For the foregoing reasons, petitioner prays that the writ of certiorari issue, and that the cause be remanded with directions to provide petitioner a complete and fair new trial.

Respectfully submitted,

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